LIBRARY
SUPREME COURT U. S.
SEP 27 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 301

In the Matter of the Application of
AMERICAN CHICLE COMPANY,
Appellant,

v.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of New York

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

LEO A. DIAMOND
350 Fifth Avenue
New York 1, New York
Attorney for Appellant

AUSTIN & DIAMOND
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1961

No. 301

In the Matter of the Application of
AMERICAN CHICLE COMPANY,
Appellant,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of New York

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Questions Presented

Appellee's motion to dismiss or affirm is directed entirely to a question that does not exist on and is foreign to this appeal, namely, whether the allocation formula pro-

vided for in Section 210.3 of the New York Tax Law, is constitutionally valid for Article 9-A franchise tax purposes, so that appellant's receipts from sales of merchandise stored in public warehouses outside the State of New York must be allocated to New York. The question which appellee thus presents involves the jurisdiction of New York to impose its corporate franchise tax on receipts from the foregoing sales. Appellant did not, however, challenge in the courts below, and does not challenge in this Court, the power of New York to tax the sales receipts in question under a statute properly directed to that end.

The real questions presented on this appeal are set forth accurately on pages 3 and 4 of appellant's Jurisdictional Statement. They involve the precise issue whether, for Article 9-A franchise tax purposes, the State of New York—by action of its Legislature, of appellee, or of both —has, notwithstanding the equal protection and due process provisions of the Fourteenth Amendment, validly exercised its power to classify for tax purposes in prohibiting or barring every public warehouse outside the State of New York from being a "permanent or continuous place of business maintained by the taxpayer", as set forth in Section 210.3(a)(2)(B) of the Tax Law. The substance of appellant's constitutional challenge may be summarized as follows: If X, a New York corporation, maintains its own warehouse, for example, in New Jersey that warehouse is a "permanent or continuous place of business maintained by the taxpayer" outside New York; and even if orders for sales of merchandise stored at that warehouse *are accepted in New York*, then, under Section 210.3(a)(2)(B) of the Tax Law, receipts from such sales are *not allocable to New York for Article 9-A franchise tax purposes.* Appellant contends that because X is not required to pay New York franchise tax on such receipts, appellant (who uti-

lizes a public warehouse in New Jersey which is automatically treated as not being a "permanent or common place of business maintained by the taxpayer" outside New York, but in all other basic respects, operates the same way as does X) also should not be required to do so—*even though the State of New York may have constitutional power to tax both X and appellant on both such receipts under a proper statute.* Thus, appellant contends that New York has made an unreasonable classification in imposing a tax on appellant's receipts from sales out of the public warehouse and not on X's receipts from sales out of its own warehouse.

The State in which an order is accepted has no bearing whatsoever on whether a place of business outside New York is or is not a "permanent or continuous place of business maintained by the taxpayer without the state" of New York as referred to in Section 210.3(a)(2)(B) of the Tax Law. Hence, where an order is accepted has no relevance whatsoever to the validity of the equal protection and due process challenges squarely presented by appellant on this appeal—despite appellee's labored effort to the contrary. Appellee's attempt to turn appellant's appeal into a challenge against the power or jurisdiction of New York under a proper statute or against the constitutional validity of the aforementioned allocation formula itself is, therefore, nothing more than an *ignis fatuus* which should not be followed by this Court in giving attention to the real questions on this appeal.

Statement of Facts

Appellee charges that appellant has made an incomplete statement of facts, tending to create misleading factual and legal inferences (Appellee's Motion, p. 2). Wherein is appellant's statement of facts allegedly incomplete?

Appellant did not expressly state that the orders for merchandise stored in the public warehouses in Florida, New Jersey, and Ohio had been accepted in New York. Also, appellant did not recite that, during 1950 to 1954, it had its own rented warehouses operated by its own employees in foreign States other than Florida, New Jersey, and Ohio, and that receipts of sales of merchandise from such rented warehouses were not allocated by appellee to New York (Appellee's Motion, p. 5). Appellant, of course, does not deny that, in the main, the orders for merchandise stored in the public warehouses in Florida, New Jersey, and Ohio had been accepted in New York (R. 54, 71-73). Likewise, appellant does not deny that it had its own rented warehouses (R. pp. 64-65) in some States other than New Jersey, Ohio and Florida.

As will be shown below, allocation of sales receipts to New York is not required, even though the covering orders are accepted in New York, where the merchandise is stored and appropriated to customers at a permanent or continuous place of business maintained by the taxpayer outside of New York. Therefore, the sales from appellant's rented warehouses in foreign States were not allocated to New York *not because the orders had been accepted outside the State of New York, but because those warehouses were permanent or continuous places of business maintained by appellant outside the State of New York.* Furthermore, if the public warehouses in Florida, New Jersey, and Ohio, utilized by appellant during the calendar years 1950 to 1954, must, under the facts of this case, be constitutionally treated as if they were permanent or continuous places of business maintained by appellant outside New York, no allocation to New York of receipts of sales of merchandise stored at those warehouses can be made, even though the orders were concededly accepted in New York.

Accordingly, the existence of appellant's rented warehouses and the acceptance of orders in New York are legally irrelevant in view of the constitutional questions presented on this appeal. Omission of those items from appellant's factual statement cannot, therefore, create any misleading factual and legal inferences favorable to appellant's cause.

The Equal Protection and Due Process Questions are Substantial.

Inasmuch as appellee has erroneously stated the question at issue as being one of the jurisdiction of New York to tax, all of Appellee's argument (Appellee's Motion, pp. 6-16) is unresponsive to the serious federal constitutional questions raised by appellant (Jurisdictional Statement, pp. 8-21). In substance, appellee's sole point is that the three factor *allocation* formula under Section 210.3 of the Tax Law is fair and constitutional, so that appellant has not been required to pay an unfair amount of franchise tax. Stripped to its core, appellee's argument is simply that, because the sales of merchandise stored in public warehouses in Florida, New Jersey, and Ohio were made on orders accepted at Long Island City, New York, receipts from such sales were properly allocated to New York.

Appellee describes appellant's position as stemming from a misunderstanding of the taxing concepts involved in New York's franchise tax formula, which misunderstanding gives rise to appellant's erroneous construction of the statute and regulations (Appellee's Motion, p. 7). Frankly, if there is any misunderstanding of what this controversy is about, it is appellee's not appellant's. New York, through Section 210.3(a)(2)(B) of its Tax Law, provides that even if orders are accepted in New York, there is no allocation to New York of receipts from sales made out

of a permanent or continuous place of business maintained by the taxpayer outside the State of New York. Furthermore, Examples 3 and 4 of Article 413(2), Regulations 9-A, quoted in full on page 10 of appellee's Motion, clearly indicate that *the acceptance of orders in the State of New York does not of itself require allocation to New York of sales receipts.*

Accordingly, citation by appellee (Appellee's Motion, pp. 6, 8) of such decisions as *Norton Co.* v. *Dept. of Revenue of Illinois,* 340 U.S. 534 (taxation of local, as distinguished from interstate, business); *Butler Bros.* v. *McColgan,* 315 U.S. 501 (fairness of an allocation formula); *Bourjois, Inc.* v. *Chapman,* 301 U.S. 183 (regulation of sale of cosmetics); *Scripto, Inc.* v. *Carson,* 362 U.S. 207 (State use tax on local sales made by nonresident foreign corporation); *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (corporate privilege dividend tax on foreign corporation related to its local business); and *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450 (nondiscriminatory income taxation of net income from solely interstate business), is wide of the mark. In *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, Ohio was permitted to exempt from property tax certain property stored in Ohio by nonresidents. In *Walters* v. *City of St. Louis,* 347 U. S. 231 this Court did not pass on the equal protection issue in the actual operation of the challenged statute.

Although all of the foregoing decisions deal with jurisdiction to impose taxation, not one involves any issue comparable to the equal protection and due process issues raised in this case because of the unreasonable classification effected by appellee and sustained by the courts below.

Appellee's argument, beginning on page 11 and continuing to page 14, is sheer double talk. If Section 210.3(a)(2)(B) of the Tax Law and Examples 3 and 4 of Article 413(2), Regulations 9-A mean anything, they certainly mean that it is utter nonsense for one to contend that, because appellant did have some of its own rented warehouses outside New York where orders were accepted

outside New York, there is a basic distinction, *for purposes of this lawsuit,* between that type of operation and the public warehouse operation which gave rise to this lawsuit. What would the appellee's position be if the orders, with respect to the warehouses rented by appellant, had been accepted in New York? The answer is that all of appellee's argument, beginning on page 11 and ending on page 14, would completely disappear for the simple reason that even if the orders had been accepted in New York, receipts of sales of merchandise stored at the rented warehouses would not have been allocated to New York. Furthermore, whether appellant is constitutionally entitled to the relief here sought is in no way dependent on whether or not it had rented warehouses in other States.

Appellee states, for example, that there is no indication in the record as to what kinds of taxes the appellant paid to the States of New Jersey, Florida, and Ohio (Appellee's Motion, p. 6), and that, apparently, appellant did not want to "localize" its business in New Jersey, Florida, and Ohio (Appellee's Motion, p. 12). A complete answer to these contentions can be found in the testimony of appellant's Tax Manager (R., pp. 74-76), wherein the nature of the taxes paid by appellant to the States of New Jersey, Florida, and Ohio is clearly shown, and where also it is definitely shown that appellant is qualified to do business in Florida and Ohio, and, of course, in New Jersey, where it is incorporated. Actually, however, appellant is entitled to due process and equal protection of the laws against the unreasonable classification here complained of regardless of the amount or kinds of taxes paid by appellant to New Jersey, Florida, or Ohio and regardless of whether or not it is qualified to do business in any or all of those States.

Appellee's argument, beginning on page 14 and continuing through page 16, is again completely irrelevant to the equal protection and due process issues of this case. That portion of appellee's argument is directed to the ir-

relevant point that the allocation formula itself is fair—otherwise, why would appellee discuss the so-called property factor which is not in controversy here?

Appellant is not contending that the principle of the allocation formula itself under Section 210.3 is unfair. It is contending—which appellee is consistently ignoring, wittingly or unwittingly—that, under appellee's application of that formula to appellant in the light of the facts of this case, appellant's constitutional rights have been impaired. Appellant is contending, as it did in the courts below, that it is unconstitutional, under the equal protection and due process provisions of the Fourteenth Amendment, for the State of New York to provide that because taxpayer A utilizes a public warehouse outside the State of New York, but in all other respects operates with the same permanence and continuity as taxpayer B who utilizes a warehouse (which it owns or rents) outside the State of New York, taxpayer A must pay a higher tax than taxpayer B solely because of the use of the public warehouse. In each case the inventory is located and appropriated to customers *outside New York* but the orders are accepted *in New York*. To attach *automatically*, therefore, to the use of a public warehouse outside New York, the price of a higher franchise tax, is, appellant respectfully contends, an unreasonable exercise by the State of New York of its power of classification without rational basis justifying such a distinction. If such classification is not unconstitutional under the equal protection or due process provisions of the Fourteenth Amendment, then, appellant respectfully submits, the various decisions of this Court, cited on pages 8, 14, and 15 of the Jurisdictional Statement, no longer represent the law and should be overruled by this Court in a formal decision. It is appellant's contention, however, that those decisions still represent the views of this Court, and, therefore, appellant's position in this case must be upheld.

Appellant will not repeat here what it has said in its Jurisdictional Statement as to the substantial doubts of

the constitutional validity of appellee's action. Nothing said in appellee's Motion to Dismiss or Affirm in any way diminishes those doubts. Appellee has furnished no real argument in support of the correctness of the decision of the court below. Accordingly, Appellee's Motion to Dismiss or Affirm should be denied.

The question of proper classification, as presented in this case under the equal protection and due process clauses, is novel. Neither the cases cited by appellee nor, in substance, any part of appellee's argument is directed to that question. Being a clear and specific question under the equal protection and due process clauses which was squarely passed upon by the courts below, it is one on which appeal lies to this Court under 28 U.S.C. Section 1257(2).

Conclusion

Appellant respectfully submits that the Court should deny, in its entirety, Appellee's Motion to Dismiss or Affirm, and that, because the decision below is erroneous and the constitutional questions presented by this appeal are substantial, novel and of public importance, the Court should take jurisdiction of this appeal.

Respectfully submitted,

Leo A. Diamond
350 Fifth Avenue
New York 1, New York
Attorney for Appellant

Austin & Diamond
Of Counsel

MICRO CARD

TRADE MARK ®

22

PC 101 2

MATTHEW BENDER & COMPANY

1 9 -

microcard